Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRICKWOOD CONTRACTORS, INC.,

Petitioner,

v.

UNITED STATES

APPEAL FROM A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
CASE NO. 01-5121

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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July 30, 2002

24 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Federal Circuit erred in concluding that the opinion of *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), which did not address the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA"), is applicable to the determination of "prevailing party" status under this EAJA application.

2. Whether the United States Court of Appeals for the Federal Circuit erred in concluding that Brickwood Contractors, Inc. was not entitled to an award of fees and costs pursuant to the EAJA.

3. Whether the United States Court of Appeals for the Federal Circuit erred in concluding that Appellant Brickwood Contractors, Inc. did not meet the requirements of a "prevailing party" pursuant to the opinion in *Buckhannon*.

PARTIES TO THE PROCEEDING

Plaintiff/Appellant	Brickwood Contractors, Inc.
Defendant/Appellee	The United States, acting through the Department of the Navy

CORPORATE DISCLOSURE STATEMENT

1. The full name of the corporate appellant:

   Brickwood Contractors, Inc.

2. All parent corporations and any publicly held companies that own 10 percent or more of the stock of Brickwood Contractors, Inc.:

   None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW iv

STATEMENT OF JURISDICTION 1

STATUTE AT ISSUE 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

I. THIS COURT HAS NOT DECIDED THE ISSUE OF WHETHER THE CATALYST THEORY IS A PERMISSIBLE BASIS FOR AN AWARD OF FEES UNDER THE EAJA 5

A. The EAJA Must Be Read As A Whole 7

B. The Plain Language of the EAJA is Distinct 7

C. The Structure of the EAJA is Distinct 9

D. The Legislative History of the EAJA Demonstrates Congress' Acceptance of the Use of the Catalyst Theory 10

II. *BUCKHANNON* IS FURTHER FACTUALLY DISTINGUISHABLE FROM THE CASE AT BAR 12

III. BRICKWOOD IS THE PREVAILING PARTY EVEN UNDER THE *BUCKHANNON* RULING 13

CONCLUSION 17

TABLE OF AUTHORITIES

CASES Page

Aynes v. Space Guard Products, Inc.,
201 F.R.D. 445 (S.D.Ind. 2001) 16

Brickwood Contractors, Inc. v. United States,
49 Fed. Cl. 148 (2001) ..... passim

Brickwood Contractors, Inc. v. United States,
49 Fed. Cl. 738 (2001) ..... passim

Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Resources, 532 U.S. 598 (2001) ..... passim

Center for Auto Safety v. Dole,
595 F.Supp. 98 (D.D.C. 1984) 6

Commissioner, INS v. Jean,
496 U.S. 154, 110 S.Ct. 2316 (1990) 9

Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977) 11

Ishida v. U.S., 59 F.3d 1224, 1230 (Fed. Cir. 1995) 7

Johnny's Icehouse, Inc. v. Amateur Hockey Association of Illinois, 2001 WL 893840, 3 (N.D. Ill. 2001) 16

Jose v. Joliet Township H.S. District 204,
2001 WL 1000734 (N.D. Ill. 2001) 16

Massachusetts v. Morash,
490 U.S. 107, 114-115, 109 S.Ct. 1668,1672-73 (1989) 7

Miley v. Principi, 242 F.3d 1050 (Fed. Cir. 2001) 6

TABLE OF AUTHORITIES

CASES Page

Public Citizen Health Research Group v. Young,
909 F.2d 546 (D.C. Cir. 1990) 6

STATUTES

Americans with Disabilities Act of 1990
42 U.S.C. §12205 ..... 5, 8

Civil Rights Act of 1964 8

Civil Rights Attorney's Fees Awards Act of 1976 8

Equal Access to Justice Act,
28 U.S.C. §2412 ..... passim

Fair Acquisition Regulation §14.404 ..... 1, 3

Fair Housing Amendments Act of 1988:
42 U.S.C. §3613(c)(2) 4, 5, 8

Voting Rights Amendments Act of 1975 8

LEGISLATIVE MATERIALS

H.R. Rep. 96-1418,
reprinted in 1980 U.S.C.C.A.N. 4984 ..... 10, 11, 12

H.R. Rep. No. 98-922, (1984) 11

H.R. Rep. No. 99-120 *reprinted in* 1985 U.S.C.C.A.N. 132 11

TABLE OF AUTHORITIES

CASES Page

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS ENTERED BELOW

Brickwood Contractors, Inc. v. United States,
288 F.3d 1371 (Fed. Cir. 2002)

Brickwood Contractors, Inc. v. United States,
49 Fed.Cl. 738 (2001)

Brickwood Contractors, Inc. v. United States,
49 Fed. Cl. 148 (2001)

STATEMENT OF JURISDICTION

(i) The judgment by the United States Court of Appeals for the Federal Circuit from which Brickwood Contractors, Inc. appeals was entered on May 3, 2002.

(ii) There have been no motions made regarding re-hearing or other extensions of time.

(iii) The statutory provision which confers on this Court jurisdiction to review the judgment in question is 28 U.S.C. §1254(1).

STATUTE AT ISSUE

The statute at issue in this matter is the Equal Access to Justice Act, 28 U.S.C. §2412 ("EAJA"). The EAJA is a lengthy statute, and therefore, pursuant to Rule 14(f) of the Rules of the United States Supreme Court, is set forth in the appendix.

STATEMENT OF THE CASE

This case arises from a protest filed in the United States Court of Federal Claims on June 18, 1999, by Brickwood Contractors, Inc. ("Brickwood"), a small woman-owned contractor, against the United States acting through the Department of the Navy (the "Government"). The basis for the federal jurisdiction in the Court of Federal Claims was 28 U.S.C. §1491. The subject of the protest was the Government's conversion of a solicitation for a certain water tank repair project from its original form of an Invitation for Bids ("IFB") to a Request for Proposals ("RFP") in contravention of FAR §14.404-1(e) and (f). The conversion occurred only after the original sealed bids were publicly opened and Brickwood was identified as the apparent low bidder. The protest sought an order enjoining the Government from converting the solicitation and the award of the contract to Brickwood.

On June 21, 1999, a hearing was held before the Court of Federal Claims regarding Brickwood's protest and request for temporary restraining order ("TRO"). Counsel for both parties were present as well as the Government's contracting officer and contracting specialist who had made the decision to convert the solicitation after the public opening of the sealed bids revealing Brickwood's bidding components and strategy.

At the hearing, the Court stated that the matter presented one straightforward issue as to whether the decision and the procedure invoked in making the conversion from an IFB to an RFP were arbitrary and capricious. The most significant factual matter was the basis for the defendant's attempted conversion.

The Court informed the parties that it had thoroughly reviewed the record presented to it and had conducted its own legal research. The Court of Federal Claims stated in the hearing regarding its review of the merits of the case that, based upon its review of the information submitted, it found no basis for the conversion and that, if it received nothing further, it would make a finding of arbitrary and capricious. Indeed, the Court of Federal Claims acknowledged in its opinion of June 29, 2001,

> In this exchange, the court, although it did not issue a written opinion, announced its acknowledgment of the merits of plaintiff's claims, the rectitude of plaintiff's position and the error of defendant's [Government's] actions.

Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 738, 748 (2001).

At the hearing, the Court then specifically questioned the Government regarding whether or not it had *any* evidence of *any* justification for the conversion of the IFB to an RFP. Despite the presence of counsel, the contracting officer and contract specialist at the hearing, the Government stated that it did not know if it had any written justification for its conversion. Indeed, the Government did

not produce any additional documentation after the hearing or even after the administrative record was compiled for the EAJA application that demonstrated a justification sufficient to support a conversion from an IFB to an RFP as required by FAR §14.404-1(e) and (f).

Following the June 21, 1999 hearing during which the Court announced its likely determination that the Government could not meet the statutory requirements to resort to the drastic measure of conversion, the Government canceled the solicitation and thus the attempted conversion of the solicitation and sought dismissal of Brickwood's action. The Government's motion to dismiss, setting forth the cancellation, explicitly stated that the Court's statements at the hearing regarding the merits of Brickwood's case prompted the Government to withdraw the conversion. In light of the Government's retreat from its position based upon the statements from the Court, the Court of Federal Claims dismissed the matter.

Thereafter, on April 9, 2001, in response to Brickwood's timely application for attorneys fees and costs pursuant to the EAJA, the Court of Federal Claims found Brickwood to be the prevailing party. The Court conducted an additional extensive review of the merits of the matter, determined that the Government's position was not substantially justified, and awarded Brickwood its fees and costs. (*Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 148 (2001)).

The Government contended in a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b) that the United States Supreme Court opinion in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Resources*, 532 U.S. 598 (2001) precluded award of attorneys fees and costs to Brickwood. However, the Court of Federal Claims, in *Brickwood Contractors, Inc. v. United States*, 49 Fed.Cl. 738 (2001), upon review of the *Buckhannon* opinion and consideration of the merits of the case, the lack of justification for the Government's position, and the Government's stated rationale for withdrawing its conversion of the solicitation, held that *Buckhannon*, which expressly analyzed the Fair Housing Amendments Act, 42 U.S.C. §3613(c)(2) and the Americans with Disabilities Act, 42 U.S.C. §12205 and made no reference to the EAJA, did not apply to the EAJA, was

factually distinguishable from the Brickwood's case, and, further, that Brickwood would still be entitled to its fee award even under the rationale of *Buckhannon*.

Thereafter, the defendant filed an appeal with the United States Court of Appeals for the Federal Circuit. The Court of Appeals rendered a judgment on May 3, 2002 reversing the Court of Federal Claims. (*Brickwood v. United States*, 288 F.3d 1371 (2002)). This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

Petitioner, Brickwood, respectfully submits that this matter is appropriate for review by this Court, particularly as it involves an important question of federal law that has not been, but should be, settled by this Court. The question of federal law that is presented is a determination of the circumstances under which a party is entitled to an award of fees and expenses pursuant to the Equal Access to Justice Act. The EAJA states in pertinent part:

> Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than in cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §2412(d)(1)(A) (emphasis added). Last year, this Court rendered a decision in the case of *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Resources*, 532 U.S. 598 (2001) regarding the fee shifting provisions of the Fair Housing Amendments Act, 42 U.S.C. §3613(c)(2) and the Americans with

Disabilities Act, 42 U.S.C. §12205. The *Buckhannon* decision did not, however, address the EAJA. As the EAJA is a distinct and unique statute actually mandating an award of attorneys fees and expenses to certain individuals and small businesses, the Petitioner respectfully submits that it is important that this Court clarify the circumstances under which small plaintiffs are entitled to an award.

The Court of Federal Claims was correct in its determination that Brickwood is entitled to an award of attorneys fees pursuant to the mandate of the EAJA. That Court reached its determination due to its detailed findings that Brickwood, a small woman-owned business, succeeded on a significant issue in the litigation which resulted in a benefit to Brickwood; that Brickwood accomplished what it sought to achieve by means of its lawsuit; that the Government's position in the matter was not substantially justified; that no special circumstances existed which made an award of fees to Brickwood unjust; and that the Government did not change its position voluntarily, but rather only in response to the Court's statement of its evaluation of the merits of the case, including the rectitude of Brickwood's position and the error of the Government's actions. The Court of Appeals for the Federal Circuit ("Court of Appeals") erred in reversing the Court of Federal Claims. It is respectfully submitted that review by this Court is appropriate to resolve this important question of federal law as to a determination of the circumstances under which a party is entitled to the fees and expenses mandated by the EAJA.

I. THIS COURT HAS NOT DECIDED THE ISSUE OF WHETHER THE CATALYST THEORY IS A PERMISSIBLE BASIS FOR AN AWARD OF FEES UNDER THE EAJA

In *Buckhannon*, the Supreme Court stated, "we hold that the 'catalyst theory' is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. §3613(c)(2), and ADA, 42 U.S.C. §12205." *Id.* 532 U.S. at 610. In reaching this holding, the Supreme Court specifically reviewed those two particular statutes and their legislative history. In dicta, the *Buckhannon* court also listed three other fee shifting statutes containing language nearly identical to the

FHAA and the ADA. This list, however, did not include the EAJA. In fact, none of the cases cited in *Buckhannon* involved a review of the EAJA. Despite the Supreme Court's direct criticism of expanding rulings based on the Court's *dicta* rather than on the Court's holdings, (*Id.* 532 U.S. at 605), the Court of Appeals reversed the Court of Federal Claims' award of fees to Brickwood based upon *Buckhannon*.

The Court of Federal Claims properly held that the decision in *Buckhannon* is not controlling in this matter. *Brickwood v. United States*, 49 Fed. Cl. 738 (2001). First, the Court determined that *Buckhannon* does not apply to fee awards issued pursuant to the EAJA. Second, the Court distinguished *Buckhannon*, where the conduct resolving the matter outside of the court was a purely voluntary change not at all prompted by the court or the lawsuit, from the present case. Finally, the Court held that, even if *Buckhannon* were controlling in EAJA cases, Brickwood would still be entitled to an award of attorney's fees under the test set forth in *Buckhannon*. Accordingly, the Court of Federal Claims was correct in its determination that Brickwood is entitled to an award of attorneys fees pursuant to the mandate of the Equal Access to Justice Act. The Petitioner respectfully submits that the reversal by the Court of Appeals should be reviewed by this Court and should be overruled.

Consistent with the plain language and legislative intent of the EAJA, numerous courts have long held that the catalyst theory is applicable in determining whether small businesses involved in litigation with the government are entitled to an award of attorneys fees under the EAJA. *See*, *Miley v. Principi*, 242 F.3d 1050 (Fed. Cir. 2001); *Public Citizen Health Research Group v. Young*, 909 F.2d 546 (D.C. Cir. 1990); and *Center for Auto Safety v. Dole*, 595 F.Supp. 98 (D.D.C. 1984). The Court of Federal Claims properly concluded that *Buckhannon* does not apply to this matter, as the EAJA is a separate and distinct statute with unique attributes that differentiate it from the statutes at issue and analyzed in the *Buckhannon* case. The *Buckhannon* decision does not effect a change in the governing law in determining whether a party is entitled to fees pursuant to the EAJA.

A. The EAJA Must Be Read As A Whole

"Basic rules of statutory construction direct us to read each statutory provision with reference to the whole act." *Ishida v. U.S.*, 59 F.3d 1224, 1230 (Fed. Cir. 1995) citing *Massachusetts v. Morash*, 490 U.S. 107, 114-115, 109 S.Ct. 1668, 1672-73 (1989). The Court of Appeals' analysis of the Court of Federal Claims' decision is faulty because it fails to review the EAJA as a harmonious whole. Rather, the Court of Appeals focuses solely on the term "prevailing party," without regard to how that term is used in the context of the statutory provision as a whole.

The Court of Federal Claims properly identified three significant aspects of the EAJA and analyzed them together. In so doing, the Court held that "[b]ecause the plain language of the EAJA statute sets forth an additional 'substantially justified' requirement in addition to the 'prevailing party' requirement as well as a statutory presumption of award ("shall award to a prevailing party") that is not contained in the fee-shifting statutes examined in *Buckhannon*, the court finds that the *Buckhannon* interpretation of "prevailing party" does not resolve the fee-shifting questions raised under EAJA."

B. The Plain Language of the EAJA is Distinct

Unlike other fee shifting statutes, the fee award pursuant to the EAJA is mandatory. It states as follows:

> Except as otherwise specifically provided by statute, *a court shall award* to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than in cases sounding in tort), including proceedings for judicial review of agency action, brought but or against the United States in any court having jurisdiction of that action, *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §2412(d)(1)(A) (emphasis added). Conversely, a fee award pursuant to the FHAA and the ADA (the statutes at issue in *Buckhannon*) as well as the Civil Rights Act of 1964, the Voting Rights Act Amendments of 1975 and the Civil Rights Attorney's Fees Awards Act of 1976 (the statutes mentioned in *Buckhannon*) are discretionary. The FHAA states:

> In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

42 U.S.C. §3613(c)(2). The ADA states:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs ...

42 U.S.C. §12205. The unique presumption present in the EAJA that the prevailing party is entitled to attorneys fees is an intentional distinction from other fee shifting statutes.

Fee shifting statutes enacted prior to the EAJA, such as the Civil Rights Act of 1964 and the Voting Rights Amendments Act of 1975, on their face, undeniably provide courts with discretion to award fees. Furthermore, statutes enacted after the EAJA, such as the FHAA and the ADA, also invest courts with discretion to award fees. However, Congress has expressed a distinctly different intent as to fee awards pursuant to the EAJA. The EAJA, unlike fee shifting statutes enacted both before and after it, actually *mandates* that a small business involved in litigation with the government be awarded fees *unless* the government's position was substantially justified or special circumstances demonstrate that an award of fees would be unjust. Such an obvious difference in the approach to the award of fees clearly warrants separate review from that applied to the statutes where Congress has made fee awards discretionary with the Court. The Court

of Appeals' failure to recognize the distinction between the EAJA and other fee shifting statutes is incorrect.

C. The Structure of the EAJA is Distinct

The EAJA has the unique characteristic, unlike other fee shifting statues, that, before fees can be awarded, the court must first review the merits of the case to determine whether the government's position was substantially justified and further that no special circumstances exist that would make an award of fees unjust. 28 U.S.C. §2412(d)(1)(A). This Court has recognized the importance and the unique characteristic of the merit review required by the EAJA. *See Commissioner, INS v. Jean*, 496 U.S. 154, 110 S.Ct. 2316 (1990). None of the statutes addressed by this Court in the *Buckhannon* case, however, contain such a provision requiring a review of the merits of the case in order to justify an award of fees.

Indeed, many of the concerns regarding the propriety of the catalyst theory expressed in *Buckhannon* are alleviated by this unique feature of merit review mandated by the EAJA. The *Buckhannon* Court criticized the catalyst theory as applied to the FHAA and the ADA because it has the potential, under those statutes, to permit awards to plaintiffs whose claims, while not frivolous, nonetheless may have only minor legal merit or may be meritless altogether. *Id.* 121 S.Ct. at 1840-41. The potential for such awards is eliminated by the required merit review set forth in the EAJA. As the Court of Federal Claims explained:

> Even if there occurred a voluntary change in the conduct of the government for an EAJA claim, the court would have to assess the merits of the government's action. In the case in which the court finds that the government's position was not substantially justified and finds the government liable to the plaintiff for EAJA fees, the finding on the merits also would have been in favor of the plaintiff, even if the case has been resolved by means other than a formal written decision by the court. The substantially justified requirement of the EAJA provides

> a safeguard to ensure that a plaintiff's victory had the necessary legal merit to support an award of attorney's fees.

Brickwood v. United States, 49 Fed. Cl. 732, 746 (2001).

An argument that the "substantial justification" requirement must be read separately from the "prevailing party" requirement cuts against the standard rules of statutory construction, as stated above, that each provision must be read in conjunction with the whole act. *Ishida v. U.S.*, 59 F.3d 1224, 1230 (Fed. Cir. 1995). Read as a whole, as stated above, and as interpreted by the Court of Federal Claims, an award under the EAJA, unlike the FHAA and ADA, cannot be made if the plaintiff's claim is meritless or even of minor merit.

Therefore, it is apparent that the EAJA is a substantively different statute than those addressed in *Buckhannon* and requires separate review of its requirements.

It is clear that Congress purposefully sought to create a fair system to compensate parties who are serving the public purpose of "help[ing] to define the limits of federal authority" and to avoid the inequitable situation of having such parties finance, through their own tax dollars, the control of unreasonable government action. See, H.R. Rep. 96-1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 4989. Petitioner therefore requests this Court to review this matter.

D. The Legislative History of the EAJA Demonstrates Congress' Acceptance of the Use of the Catalyst Theory

The House Report to the EAJA states, in part, as follows:

> A party may be deemed prevailing if he obtains a favorable *settlement* of his case, if the plaintiff has sought a *voluntary* dismissal of a groundless complaint, or even if he does not ultimately prevail on all issues.

H.R. Rep. 96-1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990 (emphasis added). The report also cites to several court decisions, including one in which attorney's fees were awarded based on a private settlement agreement. *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). These plain and deliberate references to non-judicially sanctioned results clearly demonstrate Congress' intent to permit the catalyst theory in evaluating and determining an award of fees pursuant to the EAJA.

The House Report regarding the amendment to the EAJA also echoes the intent to permit the catalyst theory. It states, "[T]he amendment will make clear that the Congressional intent is to provide for attorney fees when an unjustifiable agency action forces litigation, and the agency then tries to avoid such liability by reasonable behavior during the litigation." H.R. Rep. No. 98-922 pp. 9, 13 (1984). Additionally, as further indication of its acceptance of the catalyst theory, the Report states that fees are available, "[w]hen the case is litigated to a final decision by a court or adjudicative officer (*or even when the case is settled after only some litigation procedures*) ..." H.R. Rep. No. 99-120, p.13 (1985) *reprinted in* 1985 U.S.C.C.A.N. 132. (Emphasis added).

Furthermore, the construction of "prevailing party" using the catalyst theory is consistent with one of Congress's stated purposes in enacting EAJA: to compensate plaintiffs who cause the government to conform to the law. The report states,

> While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small business are the target of agency action precisely because they do not have the

> resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision making process.

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988-89. The catalyst theory comports with Congress' clear intention to prohibit the use of economic disparity to coerce compliance. In the absence of the catalyst theory, many plaintiffs may still forego enforcing their rights if they know that the government can avoid a fee payment by merely altering its conduct just prior to an obvious adverse ruling. Therefore, Petitioner requests this Court to review this important federal question.

II. BUCKHANNON IS FURTHER FACTUALLY DISTINGUISHABLE FROM THE CASE AT BAR

The Court of Federal Claims properly distinguished the *Buckhannon* case from the present case on the grounds that, in *Buckhannon*, the act which rendered the plaintiff's case moot — the intervening legislation by a non-party — was not in any way caused or prompted by the lawsuit brought by the plaintiff.

In the present case, however, the Government clearly acted in direct response to the Court of Federal Claims' statements. The Government's Motion to Dismiss readily admits that the basis for the Government's change in conduct was the Court's direct statements at the hearing regarding the merits of the case:

> At the hearing on the Plaintiff's motion for a temporary restraining order, the Court seriously questioned the decision to convert to a negotiated procurement ... After further consideration of both the circumstances surrounding the solicitation and the governing FAR provisions, and in light of the Court's comments at the TRO hearing, the Navy has canceled the solicitation ...

(Defendant's Motion to Dismiss, July 16, 1999, United States Court of Federal Claims Case No. 99-388 C). The Court of Federal Claims

recognized the Government's stated reason for its actions in awarding fees under the EAJA:

> The government's reevaluation and subsequent decision not to convert occurred within twenty-eight days after the plaintiff filed its first case requesting injunctive relief, and, as stated by the defendant, "in light of the court's comments at the TRO hearing." The government has offered no alternative explanation for why it changed its mind and proceeded to cancel and issue a new RFP.

Brickwood v. United States, 49 Fed. Cl. 148, 156 (2001).

Therefore, the Court of Federal Claims noted the important distinction that in *Buckhannon*, the act of the West Virginia legislature in passing new laws was undeniably voluntary and in the present case, the act of the defendant in cancelling the solicitation was undeniably compelled. The Court of Federal Claims stated, "it appears from the facts articulated by the Supreme Court in *Buckhannon* that neither the court nor the plaintiffs had a role in bringing about the resolution of the case. ... [A] direct causation [of the lawsuit] is unlikely given the independence normally exercised by legislatures when enacting laws. Moreover, the lawsuit filed by the plaintiffs did not cause a change in the defendant's behavior; the legislative revision allowed defendant to change their actions without violating state law. Under these circumstances, a plaintiff should not be entitled to claim and receive attorney's fees under any fee-shifting provision." *Brickwood v. United States*, 49 Fed. Cl. 738, 744 (2001). The Petitioner respectfully submits that the fact that the resent case presents an entirely different posture than that in *Buckhannon* renders this case appropriate for review.

III. BRICKWOOD IS THE PREVAILING PARTY EVEN UNDER THE *BUCKHANNON* RULING

The Court of Appeals incorrectly held that Brickwood is not a prevailing party under the *Buckhannon* opinion. In *Buckhannon*, this

Court stated that, in order for a party to be deemed a prevailing party, there must be a material alteration of the legal relationship between the parties with a judicial *imprimatur* on the change. *Id.* 532 U.S. at 604-5. The Court of Federal Claims held that, "the court's comments at the TRO hearing represent the necessary 'judicial imprimatur' that caused the change in the legal relationship of the parties." *Brickwood v. United States*, 49 Fed. Cl. 738, 749 (2001). In this matter, Brickwood's requested relief - the removal of the conversion of the solicitation - was accomplished only through the Court's intervention. Indeed, the Government admitted in its Motion to Dismiss that it had decided to cancel the solicitation, and thus the conversion complained of by Brickwood, "in light of the Court's comments."

At the outset of the hearing, the Court of Federal Claims clearly indicated that the entire case turned on one succinct issue - whether the defendant could justify the attempted conversion in accordance with the applicable Federal Acquisition Regulation.

> And it really is, I think, a single -issue case essentially which has some factual nuances, as all of these do. But in terms of what are we here to be talking about, it is very simply whether the amendment that was issued by the Navy was justifiable on the basis of the FAR, and particularly Section 14.404-1, which gives you the rules and the ten instances in which you can potentially do something like what appears to have been done based on, as I say, the very bare-bones complaint that was filed.
>
> DFAR that is at 214.404-1 does appear to authorize down and delegate the ability to make the findings if we go with items either six, seven or eight on the list in the FAR. So, it's a very, very simple, very straightforward.

Transcript of Hearing[1], June 21, 1999, United States Court of Federal Claims Case No. 99-388 C p. 4 line 21 - p. 5 line 8.[2] The Government confirmed that there was only one factual basis for the attempted conversion. (Tr. p. 17 lines 4-6).

The Court of Federal Claims further stated that, based on its review of the record presented to it, "*I found no basis for the change that was made, so that if I get nothing further in terms of information, I will make a finding of arbitrary and capricious.*" (Tr. p. 6 lines 18-21) (emphasis added). The Court went on to seriously question the Government, in the presence of the contracting officer and the contracting specialist who made the decision to convert (Tr. p. 4 lines 3-7), regarding whether the Navy had any evidence of a justification which would permit the conversion from an IFB to an RFP. (Tr. p. 10 line 9 - p. 12 line 16). The Court again stated "in this record so far, there is no justification." (Tr. p. 11 lines 20-21). "The court's remarks clearly signaled that it intended to find that the Navy had acted arbitrarily and capriciously and to rule in favor of the plaintiff if the Navy could not produce evidence showing that it had a sufficient justification for the attempted conversion." *Brickwood v. United States*, 49 Fed. Cl. 738, 749 (2001). A written order would not have made the Court's statements any clearer.

At the hearing, despite the presence of the contracting officer and the contracting specialist who made the decision to convert the solicitation, the Government could not respond to the Court. After the hearing, when the Government presumably had the incentive, given the statement from the Court that it would find the Government's actions

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[1] Citations to the transcript will be "Tr. p.__ line __".

[2] FAR §14.404-1 governs the narrow circumstances under which an IFB may be converted to an RFP. FAR §14.404-1(e)(1) states:

> If the invitation for bids has been canceled for the reasons specified in subparagraphs(c)(6), (7), or (8) of this subsection, and the agency head has authorized, in the determination in paragraph (c) of this subsection, the completion of the acquisition through negotiation, the contracting officer shall proceed in accordance with paragraph (f) of this subsection.

arbitrary and capricious absent further information, and an opportunity to review its records and present such information, the defendant still could not respond to the Court. Instead of providing the simple information sought by the Court to vindicate Government's actions, the Government chose to cancel the solicitation and thus the wrongful conversion of the solicitation. These circumstances clearly demonstrate that the Government's decision to give Brickwood what it sought in its lawsuit was not a voluntary decision but, rather was mandated by the Court. This conclusion is further bolstered by the Government's own admission that its decision to cancel the solicitation was driven by the Court's statements of the merits of the case during the hearing. Thus, as found by the trial court, "[t]he court's remarks at the TRO hearing amounted to a finding that the Navy had acted unlawfully, and the defendant's change in conduct was a product of judicial action in the lawsuit." *Brickwood v. United States*, 49 Fed. Cl. 738, 749 (2001). Therefore, Brickwood is the prevailing party under the requirement set forth in *Buckhannon*.

Since the *Buckhannon* decision, some district courts have found parties to be prevailing parties under the *Buckhannon* test in circumstances similar to the case at bar. *See*, *Jose v. Joliet Township H.S. District 204*, 2001 WL 1000734 (N.D. Ill. 2001) (plaintiff's acceptance of a mediation agreement which was read into the record rendered plaintiff a prevailing party); *Johnny's Icehouse, Inc. v. Amateur Hockey Association of Illinois*, 2001 WL 893840, 3 (N.D. Ill. 2001) (plaintiff's acceptance of settlement offer which was made after emergency TRO hearing and later reflected in an order rendered plaintiff a prevailing party); *Aynes v. Space Guard Products, Inc.*, 201 F.R.D. 445 (S.D.Ind. 2001) (employee's acceptance of a voluntary offer of judgment, which was neither a judgment on the merits nor a court-ordered consent decree, rendered the employee a prevailing party).

There was no uncertainty in the present case as to the Court of Federal Claims' interpretation of the merits of this case. Clearly, the Government understood the Court's intention to rule in favor of Brickwood on the merits of the case as evidenced by its own admission in its Motion to Dismiss. Even under the *Buckhannon* test, therefore, Brickwood is the prevailing party. As the Court of Appeals incorrectly applied this Court's holding in *Buckhannon*, the Petitioner respectfully submits that this Court should review this matter.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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